Supreme Court, U.S.
FILED

981462 MAR 15 1999

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No. _____

In The
Supreme Court of the United States
October Term, 1998

Charles Edward Sweeney, Jr.,
Petitioner

versus

State of Indiana,
Respondent

On Petition for a Writ of Certiorari
To the Supreme Court of Indiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state authorities may hide behind a federal plea agreement debriefing to conduct an in-custody interrogation of the federal defendant regarding a separate state offense without advising the defendant-suspect that his statements can be used against him, contrary to this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), in violation of his Fifth Amendment privilege against self-incrimination?

2. Whether a suspect's statement can be knowing and voluntary, where it was induced by the suspect's own attorneys' unequivocal, but incorrect, assurances that the state prosecuting attorney had agreed to provide use immunity so that whatever the suspect said concerning a state murder investigation could not be used against him, which agreement had not in fact been reached, contrary to this Court's decisions in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Shotwell Manufacturing Company v. United States*, 371 U.S. 341 (1963)?

3. Whether Petitioner Sweeney was denied the effective assistance of counsel under the Fifth and Sixth Amendments when his attorneys assured him that the Clark County prosecuting attorney had agreed to provide use immunity for Petitioner Sweeney's statements regarding the Guthrie homicide, when in fact no such use immunity agreement had been agreed upon by the Clark County prosecuting attorney, and Petitioner Sweeney's statements made in reliance upon his attorneys' assurances were subsequently used against him as a basis for his indictment and conviction of murder, contrary to this Court's holdings in *Miranda v. Arizona*, 384 U.S. 436

(1966), *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Davis v. United States*, 512 U.S. 452 (1994)?

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OPINION BELOW

The opinion of the Supreme Court of Indiana is published in *Sweeney v. State*, Ind., 704 N.E.2d 86 (1998), and is set forth in the Appendix to this Petition at App. 1a-57a.

The findings of fact, conclusions of law and ruling of the Clark Circuit Court were made at the conclusion of a suppression hearing conducted on November 11, 1994, and reiterated at the conclusion of a supplemental suppression hearing conducted on November 22, 1994. Said findings, conclusions and ruling are set forth in the Appendix to this Petition at App. 1b-3b.

JURISDICTION OF THIS COURT

The Opinion of the Supreme Court of Indiana was entered on December 18, 1998. [Opinion, Appendix, p.1a-57a] This Court has jurisdiction to review the judgment of the Indiana Supreme Court pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall ... be compelled in any criminal case to be a witness against himself.

The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

In a jury trial held in November 1995, Petitioner Charles Sweeney was convicted of murder. [Judgment of Conviction, R. 486] The trial court imposed a sentence of sixty (60) years imprisonment. [Sentencing Order, R. 487-489]

The evidence upon which Petitioner Sweeney was convicted was obtained from Petitioner Sweeney "out of his own mouth." The facts and circumstances of the involuntary statement which the prosecution used to convict may be set forth as follows.

Petitioner Sweeney's statement regarding a state homicide was given in connection with a federal plea agreement on a federal charge of using a bomb in connection with a crime of violence, in violation of 18 U.S.C. §924(c). [Plea Agreement, R. 633, State's Exhibit 1; and Amended Plea Agreement, R. 643, State's Exhibit 3] Prior to giving any statement pursuant to the federal plea agreement, Petitioner Sweeney and his attorneys sought state use immunity for any statements he might make regarding the state homicide.

At all times during the two full days of interrogation, Petitioner was in custody. The fact of custody is not contested.

> The record reflects indisputable evidence that defendant was in federal custody. [Opinion, Appendix, p. 34a]

Interrogation during the two days was conducted by federal and state officers. During the first day, federal officers debriefed Petitioner Sweeney regarding the federal offense to which he was pleading guilty. During the second day, it is uncontested that a postal officer named Vance Arnold was present *as the representative of the State of Indiana* to conduct the interrogation regarding the long-unsolved state homicide investigation in which Petitioner Sweeney was a suspect.

> VANCE ARNOLD: I was asked to ... serve as a representative of the Clark County Police Department with respect to other information that Mr. Sweeney was going to provide including the location of the body of Danny Guthrie. [Vance Arnold, R. 688]

> VANCE ARNOLD: I was a representative of the Clark County Police Department with respect to recording the information being provided by Mr. Sweeney during this Federal debriefing. [Vance Arnold, R. 698]

> Q: [W]hen did you start your portion regarding the homicide investigation into the death of Danny Guthrie?

> VANCE ARNOLD: That was on June 30.
>
> Q: Okay, that would be the second day.
>
> VANCE ARNOLD: Yes. ... [I]t was the last information provided at the end of the two-day session. [Vance Arnold, R. 692]
>
> DETECTIVE HAROLD KRAMER: The second day I would say that most of the questions that were asked were asked by Inspector Vance Arnold.
>
> Q: Are you saying that the questions in connection to the whereabouts of Danny Guthrie's body were asked by Vance Arnold primarily?
>
> DETECTIVE HAROLD KRAMER: I'd say the majority were, yes, sir. [R. 1332]

It is further uncontested that Petitioner Sweeney was never informed that any statements he might make regarding the state homicide could be used against him, as required by this Court's decision in *Miranda* to protect his Fifth Amendment right against self-incrimination.

> The record reflects indisputable evidence that the defendant was in federal custody and indeed was not advised of his *Miranda* rights. [Opinion, Appendix, p. 34a]

The State of Indiana's representative at the two-day interrogation of Petitioner Sweeney confirmed that he had not

advised Petitioner Sweeney that his statement could be used against him. When asked if he or anyone else had given the *Miranda* warning to Petitioner Sweeney that day, Vance Arnold said, "No, I did not." [Vance Arnold, R. 697]

> Q: Did you hear anybody else in that room tell Mr. Sweeney that the statement he was giving in connection with Danny Guthrie could be used against him?
>
> VANCE ARNOLD: No. [Vance Arnold, R. 702]
>
> ***
>
> Q: Did you inform Mr. Sweeney prior to him making this statement that it would be and could be used against him?
>
> VANCE ARNOLD: No sir.
>
> Q: All right, so you didn't give him the *Miranda* rights that we hear so often on television for example?
>
> VANCE ARNOLD: That's correct. [Vance Arnold, R. 1609]

Prior to giving any statement pursuant to the federal plea agreement, Petitioner Sweeney and his attorneys sought state use immunity for any statements he might make regarding the state homicide. When his attorneys felt they had obtained use immunity regarding any state-

ments Petitioner Sweeney might make concerning the state homicide, they assured Petitioner Sweeney he would not be prosecuted based on any statements he made regarding that homicide.

Petitioner Sweeney's counsel Michael McDaniel, an attorney with 26-years experience in criminal defense work [Michael McDaniel, R. 601], contacted the state's prosecuting attorney Steven Stewart regarding use immunity for any statements concerning the Danny Guthrie homicide.

> MICHAEL McDANIEL: I contacted Mr. Stewart early in the morning by telephone. ... [W]e wanted use immunity in several areas ... wanted to obtain a use immunity on the Guthrie homicide. ... [O]n the issue of the Guthrie homicide, he indicated he would prosecute Mr. Sweeney if he was able to obtain independent information which would justify the prosecution. Now my understanding of that portion of the conversation would have been that we had the use immunity agreement. [Michael McDaniel, R. 606, 607, 608]

Petitioner Sweeney's counsel McDaniel assured Petitioner Sweeney about the effect of the use immunity agreement with the Clark County prosecuting attorney regarding statements concerning the Guthrie homicide.

> MICHAEL McDANIEL: [W]e would have met privately and confidentially with Mr. Sweeney. I would have advised him what

> the nature of the phone call would have been and that the fact that he had use immunity that anything he said concerning the Guthrie incident could not form the basis for prosecution against him and advised him that we did not have this in writing, but I had talked with the Prosecuting Attorney, it was clearly my understanding that's what the agreement was, and he accepted what Mr. Sedwick and I had to say as being the way the situation was that he did indeed have use immunity, and because he did, ... because of the use immunity he agreed to cooperate fully with the United States and with the Postal Inspector. [Michael McDaniel, R. 611-612]

Petitioner Sweeney's counsel McDaniel reassured Petitioner Sweeney that the use immunity agreement was "carved in stone."

> Q: [D]o you recall Mr. Sweeney asking you about the agreement you reached with Mr. Stewart, and him being informed that that agreement was "carved in stone?"
>
> MICHAEL McDANIEL: I think I can say I definitely said that. ... He [Mr. Sweeney] would have been advised that anything he said would not have been, would not be in the future used against him to generate a murder charge. Would have taken him, limiting our conversation to the homicide, that's exactly what he would have been told, and he would have been told too, it would

> be appropriate to give as complete of a statement as possible, because use immunity was in place and in effect in his case. [Michael McDaniel, R. 627-628]

Petitioner Sweeney's second defense attorney, Edwin Sedwick, has practiced law since 1972. [Edwin Sedwick Deposition, R. 669, p. 4] Sedwick outlined the use immunity agreement with the Clark County Prosecutor.

> EDWIN SEDWICK: [I]t was on the morning of June 30th, 1992. Mike McDaniel talked with Steve Stewart. ... And at that point in time, reached an agreement with the prosecutor pertaining to use immunity for Chuck Sweeney, as it relates to this Guthrie question. ... [T]he agreement was that there would not be any State prosecution over anything which might develop out of whatever statement Chuck Sweeney would give.... [Edwin Sedwick Deposition, R. 669, pp. 7-8]

Petitioner Sweeney's lawyers assured him the use immunity agreement was in place, and in reliance on their assurances, Petitioner Sweeney gave the statements concerning Danny Guthrie's body which subsequently were used against him to procure his conviction for murder.

> EDWIN SEDWICK: The terms of the agreement were related to Chuck Sweeney. ... There's no doubt in my mind that Chuck Sweeney, from his perspective, was -- had an understanding that he was being afforded

> use immunity -- immunity within the context of what's on my notes, before he gave the authorities any type of information dealing with Daniel Guthrie, or the whereabouts of his body. [Edwin Sedwick Deposition, R. 669, pp. 10, 26]

Thus, it is uncontested that Petitioner Sweeney's statements were made in light of the assurances of his own attorneys that use immunity had been promised in exchange for the statements.

Clark County Prosecutor Steven Stewart testified that he had never told defense counsel McDaniel that Petitioner Sweeney's statements would not be used against him.

> STEVEN STEWART: In neither of those conversations, did I tell Mr. McDaniel that his statements would not be used against him on the murder. [Steven Stewart, R. 672]

Petitioner Sweeney's Motion to Suppress Statement [R. 114-116] argued the statement was "involuntary" and should be suppressed because: 1) "Sweeney did not knowingly and voluntarily waive his Fifth Amendment right against self-incrimination prior to being interrogated"; 2) "Sweeney was not advised of his *Miranda* warnings prior to giving said statement so he was not informed that the statement would be used against him"; 3) "Sweeney gave the statement under the advice of his attorneys that the government could not use the statement and that he was not, therefore, incriminating himself"; and 4) the statement would be inadmissible in that

admission of same would constitute a violation of Sweeney's right to effective and competent representation -- "if Sweeney's counsel wrongly informed him his statement was protected when it was not, such acts would constitute the highest most grievous acts of ineffectiveness of counsel." [R. 114-116]

Parallel arguments also were raised in Petitioner Sweeney's Motion to Dismiss Information [R. 32-33], citing to both state and federal constitutions; Motion for Appointment of Special Prosecutor [R. 36-40]; and Memoranda in Support of Motion to Dismiss [R. 73-77].

On November 10, 1994, the trial court conducted a suppression hearing regarding the June 30, 1992 statement of Petitioner Sweeney concerning the Danny Guthrie homicide. The trial court denied the motion to suppress. Without filing written findings and conclusions, the trial court ruled from the bench at the conclusion of the hearing as follows, in pertinent part:

> THE COURT: I'm not about to handicap the State of Indiana for a misunderstanding, and I'm going to call it a misunderstanding, that Defense Counsel might have had in a very brief conversation with the Prosecuting Attorney. [R. 725-726; Appendix, p. 1b] I can see how there could be a misunderstanding and I'm calling it a misunderstanding but I don't have any evidence here before me today to indicate that the State of Indiana granted use immunity to ... Mr. Sweeney regarding information concerning the location

of the body of Mr. Guthrie. [R. 727-728; Appendix, p. 2b]

THE COURT: Now for Mr. Sweeney's situation it may be considered to be a gross misunderstanding. [R. 727; Appendix. pp. 1b-2b]

THE COURT: I'm not going to apply *Miranda*, at least to the extent that the Defense wants me to technically apply it. I know of no particular provisions in the Federal law or in State law that says you have to use those exact words before you're permitted to use an admission of a Defendant or a confession of a Defendant. The whole purpose of *Miranda* is to make certain that that individual is fully aware of his Constitutional Rights. ... That's one way of doing it, that's probably the clearest way of doing it, that's the acceptable way of doing it but in this particular case I had a Defense Counsel tell me that he went to extremes, and I think he used the word extremes or he certainly used the word great lengths in explaining to Mr. Guthrie [*sic*] what use immunity meant and what transactional immunity meant and this went on on several occasions, not just the date of the negotiations with the Feds, this was preceded a number of times and use immunity goes to the very heart and soul of giving statements against your interests and whether or not those statements can be used against you and Mr. Sweeney had two com-

> petent attorneys practicing around here for 27 odd years or whatever the amount of years were, underlying the bottom line here. Without hearing argument from either side, the Motion to Suppress the Statement is denied. [R. 729-731; Appendix, pp. 2b-3b]
>
> THE COURT: Without hearing argument from either side, the Motion to Suppress the Statement is denied. The Motion to Dismiss the Information is denied. [R. 731; Appendix, p. 3b]

The trial court's remarks denying Petitioner Sweeney's Motion to Suppress Statement [R. 725-731] are set forth in full in the Appendix to this petition, at App. pp. 1b-3b.

The trial court's ruling barely touched on the voluntariness or involuntariness of Petitioner Sweeney's statement, saying only that, from Petitioner Sweeney's viewpoint, "it may be considered to be a gross misunderstanding." [R. 727; Appendix, pp. 1b-2b] Rather, the trial court focused on the misunderstanding between defense counsel and the state's prosecuting attorney.

As the Indiana prosecuting attorney acknowledged at the beginning of the suppression hearing, the state would not have a case without Petitioner Sweeney's June 30, 1992 statement.

> WILLIAM GRIMES: I would advise the Court that we have previously stated that without the statement we probably could not proceed. [William Grimes, R. 596]

Indeed, the State of Indiana prosecuted the murder charge based exclusively on Petitioner Sweeney's statement and evidence developed directly from that statement.

The state's principal witness was the case detective Harold Kramer. Harold Kramer was employed by the Clark County Sheriff's Office. [R. 1246] Completely unknown to Petitioner Sweeney (although known to his attorneys), state case detective Harold Kramer listened to and viewed from a separate office the entire interrogation of Petitioner Sweeney regarding the Guthrie homicide. At trial, Detective Kramer gave lengthy evidence of the contents of Petitioner Sweeney's statement.

> DETECTIVE HAROLD KRAMER: I was in the office of the chief investigator who had a closed circuit monitor that provided security to various interview rooms and from that location I was able to observe the debriefing. [R. 706]

Kramer testified as to the extensive details of Petitioner Sweeney's statement, regarding Sweeney's contact with Danny Guthrie on May 28, 1991, their activities together, where they went and what they did, their fishing expedition, their involvement with marijuana plants, Sweeney's contact with Kim Guthrie on May 29, 1991, how Sweeney had located the body of Danny Guthrie and how Sweeney had buried Guthrie's body, how some unknown person or Guthrie himself had shot Guthrie in the head with a 9 millimeter handgun that Sweeney had loaned to Guthrie earlier on May 28, 1991, and how Sweeney had buried the gun in a can. **Sweeney's state-**

ment was clear that he, Sweeney, had not shot Guthrie but had discovered and buried Guthrie's body. Kramer testified that Sweeney provided a map "that was written and drawn by Chuck Sweeney at Indianapolis during the statement indicating the location of Danny Guthrie's body" [R. 1279, 1313] which was introduced.

Kramer testified that Sweeney had placed Guthrie's fishing gear near the door of Guthrie's residence. Kramer testified about Sweeney's explanation for previous inconsistent statements. Kramer testified that Sweeney "thought or he indicated that Danny was working for the police." [R. 1312]

Vance Arnold, who on behalf of the state prosecuting attorney conducted the interrogation of Petitioner Sweeney concerning the Danny Guthrie homicide, likewise testified at length about the details of Petitioner Sweeney's statement and the map Sweeney drew showing the location of Guthrie's body. [R. 1594-1607]

Based on Detective Kramer's recitation of the details of Petitioner Sweeney's statement and evidence developed directly from that statement, the prosecution obtained conviction of Petitioner Sweeney for the murder of Danny Guthrie. In other words, Petitioner Sweeney was convicted by words out of his own mouth.

The Indiana Supreme Court, in *Sweeney v. State*, Ind., 704 N.E.2d 86 (1998), addressed the voluntariness issue and made three separate holdings. [Opinion, Appendix, pp. 33a-41a]

First, the Indiana Supreme Court held that, although the record demonstrates Petitioner Sweeney was not advised of his *Miranda* rights, "an equivalent to the advisement of *Miranda* rights existed."

> The record reflects indisputable evidence that defendant was in federal custody and indeed was not advised of his *Miranda* rights. ... In this case, we believe that an equivalent to the advisement of *Miranda* rights existed. Defendant had two of his lawyers present when he provided the statements which he now wishes to suppress. Irrespective of the fact that the defense attorneys encouraged defendant to provide certain statements to federal authorities to solidify a plea agreement, certainly these defense attorneys advised defendant of his rights and protected defendant from being coerced by the State. Under these circumstances, we find no error in the State's failure to advise defendant of his *Miranda* rights. [Opinion, Appendix, pp. 34a-35a]

As Petitioner argues, *infra*, nobody ever advised Petitioner Sweeney that his statement could be used against him in a state murder prosecution. It is uncontested that Vance Arnold, the state's representative conducting the interrogation regarding the Guthrie homicide, never advised Petitioner Sweeney that his statement could be used against him, even though he knew Petitioner Sweeney was a suspect. Petitioner Sweeney's defense attorneys never advised him that his statement could be used against him; in fact, they advised him to tell every-

thing he knew, assuring him that he was protected by use immunity from the state prosecutor.

Second, the Indiana Supreme Court held that there "was a misunderstanding between the defense counsel and the State and that in fact no use immunity existed."

> Defendant next contends that ... the statements which defendant provided were inadmissible because they were made under the belief that the State had granted him use immunity. The trial court determined that there was a misunderstanding between the defense counsel and the State and that in fact no use immunity existed. We agree with the trial court's finding. ... We agree with the trial court's finding that the prosecutor's statements do not suggest that he was offering defendant use immunity. [Opinion, Appendix, pp. 35a-36a]

As Petitioner argues, *infra*, the court's conclusion that "there was a misunderstanding between the defense counsel and the State" sidesteps the issue. Petitioner Sweeney never communicated with the state prosecutor; only his attorneys communicated with the state prosecutor. There was no misunderstanding whatsoever between Petitioner Sweeney and his attorneys. They told him point blank he had use immunity regarding the Guthrie homicide, and that he should tell everything he knew. They told him the agreement was "carved in stone." "[I]t would be appropriate to give as complete of a statement as possible, because use immunity was in place and in effect in his case." [McDaniel, R. 628] Petitioner

Sweeney's statement was involuntary precisely because it was induced by this false assurance that use immunity was "in place and in effect in his case."

Third, the Indiana Supreme Court held Petitioner Sweeney was not denied the right to the effective assistance of counsel, because the right to counsel does not commence until "at or after the initiation of adversary judicial criminal proceedings," and Petitioner Sweeney had not been charged with the murder of Danny Guthrie at the time Petitioner Sweeney made the statements which formed the basis for the murder charge.

> Defendant finally contends that ... he was denied the effective assistance of counsel. ... Defendant's claim of ineffective assistance of counsel is based on the fact that his counsel failed to obtain a writing or recording of the grant of "use immunity." ... [W]e assume, without deciding, that counsel was deficient for failing to obtain an agreement in writing. ... In this case, although federal charges had been filed, the State had not yet filed charges for the murder of Guthrie. Consequently, defendant's Sixth Amendment right to counsel and, thus, his right to the effective assistance of counsel had not attached when he provided statements regarding the location of Guthrie's body. [Opinion, Appendix, pp. 38a-41a]

As Petitioner Sweeney argues, *infra*, it is not simply the failure of defense counsel to obtain immunity in writing which has rendered their representation at the June 30,

1992 interrogation such a farce and a mockery, but rather their advice to Petitioner Sweeney that use immunity is in place and he should tell everything he knows, in the teeth of their failure to obtain use immunity in writing, which caused him unknowingly and involuntarily to convict himself out of his own mouth. Whether characterized as Fifth Amendment ineffective assistance of counsel or Sixth Amendment ineffective assistance of counsel, Petitioner Sweeney's defense counsel failed utterly to protect his Fifth Amendment right against self-incrimination, resulting in his conviction for murder.

On appeal, Petitioner Sweeney placed the issue of his involuntary statement before the Indiana Supreme Court.

> The 5th Amendment to the United States Constitution provides, in part, that no person "shall be compelled in any criminal case to be a witness against himself." The 5th Amendment requirement is the same for the State and the Federal Government. The basic issue for any determination of admissibility of a statement is whether the statement is voluntarily given. [Brief of Appellant, p. 22]

The issue of whether Petitioner Sweeney voluntarily and knowingly gave up his Fifth Amendment protection against self-incrimination requires further review or supervision by this Court.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to determine whether state authorities may hide behind a federal plea agreement debriefing to conduct an in-custody interrogation of the federal defendant regarding a separate state offense without advising the defendant-suspect that his statements can be used against him, contrary to this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), in violation of his Fifth Amendment privilege against self-incrimination.

As set forth in detail in the Statement of the Case, *supra*, in the course of a two-day plea agreement interrogation, in which federal authorities debriefed Petitioner Sweeney regarding the federal offense, and then an officer representing the Clark County, Indiana prosecuting attorney interrogated Petitioner Sweeney regarding a separate murder investigation, Petitioner Sweeney gave a lengthy statement regarding the state murder investigation which led directly to his indictment and conviction for murder.

It is uncontested that Petitioner Sweeney was a suspect in the murder investigation at the time he was interrogated.

> VANCE ARNOLD: Mr. Sweeney was suspected of murder.

> Q: And you knew that before you conducted debriefing on June 30th, is that correct?
>
> VANCE ARNOLD: Yes. [Vance Arnold, R. 696]

It is uncontested that Petitioner Sweeney was never warned that his statement could and would be used against him, as required by this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966).

The record reflects indisputable evidence that the defendant was in federal custody and indeed was not advised of his *Miranda* rights. [Opinion, Appendix, p. 34a, quoted *supra*]

In *Miranda*, this Court stated the warning requirement and the reason for the warning.

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. *Miranda, supra*, 384 U.S. at 469.

At the two-day interrogation, Petitioner Sweeney had been advised by his attorneys that whatever he said concerning the state murder investigation *could not be used*

against him because they had obtained a use immunity agreement with the prosecuting attorney. This advice was incorrect.

Had Petitioner Sweeney been advised of his *Miranda* right to remain silent, with the warning that whatever he said could and would be used against him, as required by this Court, *his attorneys' incorrect advice would have been exposed, and he would have known the peril he faced.* Had he been given the *Miranda* warning, as required, Petitioner Sweeney would have been able to make the knowing and voluntary choice guaranteed by the Fifth Amendment protection against self-incrimination.

Without the required *Miranda* warning, Petitioner Sweeney's statement was neither knowingly nor voluntarily made. Nevertheless, the state utilized the statement and evidence developed directly from it to indict and convict Petitioner Sweeney.

Petitioner Sweeney respectfully urges this Court to protect the Fifth Amendment privilege against self-incrimination, as it arises in this particular case.

II.

Certiorari should be granted to determine whether a suspect's statement can be knowing and voluntary, where it was induced by the suspect's own attorneys' unequivocal, but incorrect, assurances that the state prosecuting attorney had agreed to provide use immunity so that whatever the suspect said concerning a

state murder investigation could not be used against him, which agreement had not in fact been reached, contrary to this Court's decisions in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Shotwell Manufacturing Company v. United States*, 371 U.S. 341 (1963).

As set forth in detail in the Statement of the Case, *supra*, Petitioner Sweeney was interrogated in custody for two days by federal officers and an officer representing the Clark County, Indiana prosecuting attorney. The federal officers debriefed Petitioner Sweeney regarding the plea-bargained federal offense, and the officer representing the Clark County, Indiana prosecuting attorney interrogated Petitioner Sweeney regarding a state investigation into the homicide of Danny Guthrie.

Prior to the interrogation of Petitioner Sweeney regarding the state murder investigation, Petitioner Sweeney's attorney Mike McDaniel contacted Clark County prosecuting attorney Steven Stewart regarding use immunity for any statement regarding the murder investigation. Both of Petitioner Sweeney's attorneys believed they had obtained a use immunity agreement with Stewart regarding the murder investigation, and they communicated that agreement to Petitioner Sweeney.

> The terms of the agreement were related to Chuck Sweeney. ... There's no doubt in my mind that Chuck Sweeney, from his perspective, was -- had an understanding that he was being afforded use immunity -- immunity within the context of what's on my

> notes, before he gave the authorities any type of information dealing with Daniel Guthrie, or the whereabouts of his body. [Edwin Sedwick Deposition, R. 669, pp. 10, 26]

Any doubt Petitioner Sweeney may have had about the existence and protection of the use immunity agreement was dispelled by his attorney McDaniel's reassurance that the use immunity agreement was "carved in stone." [McDaniel, R. 627]

Sweeney's attorneys' understanding that a use immunity agreement had been reached was incorrect. In fact, the Clark County prosecuting attorney denied that such an agreement had been reached. [Stewart, R. 672] The technical requirements for use immunity in Indiana had not been met. The Indiana Supreme Court's Opinion decided the instant issue by holding that no use immunity agreement existed between Sweeney's attorneys and the state prosecutor [Opinion, Appendix, pp. 35a-36a]; but it is submitted the constitutional issue is whether Petitioner Sweeney's attorneys' assurances that a use immunity agreement was in place to protect his statements induced Petitioner Sweeney's statements.

From Petitioner Sweeney's viewpoint, the effect of the incorrect assurances of his own attorneys was no different than it would have been had the Clark County prosecuting attorney entered into the alleged use immunity agreement and then broken it. Petitioner Sweeney was entirely in the hands of his attorneys, who were also officers of the court, and he was fully entitled to believe

that the misrepresentations made to him by his attorneys McDaniel and Sedwick were true.

Here there was a flat incorrect representation by McDaniel and Sedwick that there was an agreement for use immunity in exchange for Petitioner Sweeney's statements regarding the Guthrie homicide, though there was no agreement. It was of no constitutional difference to Petitioner Sweeney whether the use immunity agreement was reached and not kept, or whether it was never in fact reached.

It is uncontested that Petitioner Sweeney's attorneys represented to him that the Clark County prosecutor had entered into the use immunity agreement and that Petitioner Sweeney's statements regarding the Guthrie homicide would be protected.

A promise that statements made will not be used against the declarant is a truly powerful promise, going to the heart of a declarant's reservations about giving a statement. In *Shotwell Manufacturing Company v. United States*, 371 U.S. 341 (1963), this Court stated the particularly coercive effect of a "promise of immunity."

> It is of course a constitutional principle of long standing that the prosecution must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. [Citation omitted.] We have no hesitation in saying that this principle also reaches evidence of guilt induced from a person under a governmental promise of

> immunity, and where that is the case such evidence must be excluded under the Self-Incrimination Clause of the Fifth Amendment. [Numerous citations omitted.] *Shotwell*, *supra*, at 347.

In a word, the assurance that an immunity agreement is in place is so attractive that it renders resulting statements involuntary. In *Malloy v. Hogan*, 378 U.S. 1 (1964), this Court held that, to be voluntary, the confession or statement

> must not be ... obtained by any direct or implied promises, however slight. *Malloy*, *supra*, p. 7.

Accord, Hutto v. Ross, 429 U.S. 28, 30 (1976).

Where substantial evidence demonstrates that Petitioner Sweeney's statements regarding the Guthrie homicide were induced by his attorneys' unequivocal assurances that use immunity was in place, an inducement recognized by this Court in *Shotwell* as especially powerful, and where this Court has held in *Malloy* that a confession is not voluntary when it is "obtained by any direct or implied promises," it is impossible to discern how Petitioner Sweeney's June 30, 1992 statements regarding the Guthrie homicide could be said to be knowing and voluntary.

Petitioner Sweeney respectfully urges this Court to protect the Fifth Amendment privilege against self-incrimination, as it arises in this particular case.

III.

Certiorari should be granted to determine whether Petitioner Sweeney was denied the effective assistance of counsel under the Fifth and Sixth Amendments when his attorneys assured him that the Clark County prosecuting attorney had agreed to provide use immunity for Petitioner Sweeney's statements regarding the Guthrie homicide, when in fact no such use immunity agreement had been agreed upon by the Clark County prosecuting attorney, and Petitioner Sweeney's statements made in reliance upon his attorneys' assurances were subsequently used against him as a basis for his indictment and conviction of murder, contrary to this Court's holdings in *Miranda v. Arizona*, 384 U.S. 436 (1966), *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Davis v. United States*, 512 U.S. 452 (1994).

As set forth in detail in the Statement of the Case, *supra*, and in issue II, *supra*, Petitioner Sweeney was induced to make a lengthy statement regarding the Guthrie homicide by his attorneys' assurances that they had secured a use immunity agreement with the Clark County prosecuting attorney and that Petitioner Sweeney's statement would not therefore be used against him later. Petitioner Sweeney's attorneys were incorrect in their assurances; the prosecuting attorney *had not agreed* to provide use immunity, and the agreement did not satisfy the technical requirements for use immunity in Indiana any-

way. Contrary to the assurances of his attorneys regarding use immunity, Petitioner Sweeney's statement was used as the basis for his state indictment and conviction for murder.

These circumstances set forth the deficient performance and prejudice which are the hallmarks of the denial of effective assistance of counsel, as identified in this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). The deficient performance is the lawyers' incorrect advice to Petitioner Sweeney which encouraged him to make the statement regarding the Guthrie homicide. The prejudice is the evisceration of Petitioner Sweeney's Fifth Amendment privilege against self-incrimination and the resulting conviction based on his statement regarding the Guthrie homicide.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court announced a "Fifth Amendment" right to counsel to protect the Fifth Amendment privilege against self-incrimination.

> [T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. *Miranda*, *supra*, at 469.

This Court has reaffirmed the right to have counsel present during custodial interrogation. For instance, in *Davis v. United States*, 512 U.S. 452 (1994), this Court stated:

> We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial

> interrogation even though the Constitution does not prove for such assistance. ... [B]efore proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel. Nevertheless, we held in *Miranda v. Arizona*, 384 U.S. 436, 469-473, 86 S.Ct. 1602, 1625-1627, 16 L.Ed.2d 694 (1966), that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning. *Davis*, *supra*, at 457, 462.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court reaffirmed a state defendant's Fifth Amendment right "to have counsel present during custodial interrogation."

> *Miranda* thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. ... The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. *Edwards*, *supra*, at 482, 485-486.

Petitioner Sweeney's Fifth Amendment right to counsel was rendered a farce and a mockery, resulting in his conviction for murder, when his attorneys McDaniel and Sedwick induced him with assurances of a use immunity agreement which did not exist to deliver up the lengthy statement which convicted him out of his own mouth. The prejudice to Petitioner Sweeney is undeniable. It is difficult to see how incorrect representations by counsel,

however motivated, could have had more disastrous consequences for the client.

Whether these circumstances are perceived as a violation of Petitioner Sweeney's right to counsel under the Fifth Amendment or under the Sixth Amendment, Petitioner Sweeney respectfully urges this Court to protect his right to effective assistance of counsel as indispensable to the protection of his Fifth Amendment privilege against self-incrimination, as arises in this particular case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: March 12, 1999
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